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IN THE

Supreme Court of the United States

October Term, 1962

Number [redacted] 1351

JOHN D. BYRD and RALPH H. BYRD,

Petitioners

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

[redacted]

WESLEY R. ASINOF
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Atlanta 3, Georgia

IN THE

Supreme Court of the United States

October Term, 1962

Number

JOHN D. BYRD and RALPH H. BYRD,

Petitioners

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

Now comes John D. Byrd and Ralph H. Byrd, petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners John D. Byrd and Ralph H. Byrd were indicted for the offense of conspiracy to violate the In-

ternal Revenue laws and for related substantive offenses along with nine (9) other named defendants. All eleven of the named defendants were placed on trial with the exception of Rufus Lee who had been ordered by the court to be severed and H. M. Norton whose case was continued. After the start of the case a mistrial was declared by the court as to defendant Wade Wright on account of illness. Of the remaining eight defendants who were placed on trial the other six were acquitted, either by the jury or by the court on a judgment of acquittal. The two named petitioners were the only defendants convicted. They were found guilty by the jury on counts one, (conspiracy), two, (possessing still), and six, (possessing still).

It was the contention of the government that all of the defendants had entered into a conspiracy to violate the Internal Revenue laws of the United States, and that in furtherance of the scheme they set up and caused to be operated three different stills at different times and performed other acts incidental with such operation. A portion of the evidence was the testimony of witnesses who sought to identify one or the other of the petitioners as persons who had rented and bought property under assumed names where stills were later set up and operated. However, defense witnesses were produced on all of such transactions who testified they were present at the time of the particular transactions and that neither of the petitioners were the persons who conducted such transactions. The defense produced a qualified handwriting expert who testified that the signatures on the lease and deed in question were not written by either of the petitioners. The government produced another

handwriting expert who testified that in his opinion the handwriting was the same.

As to the various phases of the evidence for the government the defense offered testimony in contradiction, and it became a close jury question as to which of the evidence the jury believed. The government also offered the testimony of an alleged co-conspirator, one Louise Beck Bradford. The defense sought to impeach her testimony by showing previous contradictory statements, rewards by the government for her testimony and protection by federal agents from prosecution by the local authorities for offenses of manufacturing liquor and related offenses.

As to the witness Bradford, the government, on direct examination, (R. 125) asked this witness if she had any cases pending against her at that time. The witness replied that she did in Dawson County for manufacturing whiskey, but that she had not made bond and did not know what the charges were. On further examination by the government the witness was permitted to testify that she had no connection with the still involved in that case and that it belonged to her husband and other people not connected with this case.

On cross-examination of this witness she admitted that she had cases pending against her in Dawson County for manufacturing liquor and for possessing two hundred twenty four gallons of liquor, and that the persons who had arrested her on that charge were the Sheriff of that county and two federal officers. (R. 128). One of the officers named was Alex Evans.

The defense sought to impeach this testimony by offering Alex Evans as a witness so as to show that the

witness really was guilty of the offenses with which she was charged in Dawson County. The court, without any objection by the United States Attorney, refused to permit defense counsel to inquire of the witness Evans as to the surroundings of the distillery found behind government witness Bradford's house (R. 703). The court, later on, refused to permit defense counsel to inquire of the witness Evans as to the liquor found on the premises at the same time.

The United States Court of Appeals for the Fifth Circuit, in affirming the judgment of conviction, held that (1) the error was not properly preserved, (2) that it was not plain error, (3) the claimed error does not appear to be error at all since the witness testified in substance to what appellants contend was excluded," and (4) "the testimony was offered for the purpose of contradicting a statement by a witness for the prosecution, made without objection, going to a collateral matter and there was no abuse of discretion in the ruling of the trial judge."

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on March 6, 1963. A petition for rehearing was denied on April 23, 1963. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule 11 of the Rules of Practice and Procedure.

(b) This petition for certiorari is being filed in this

case within 30 days from the date of the judgment denying the petition for rehearing.

(c) The nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

THE QUESTIONS PRESENTED

1. Where the government elicits answers from one of their own witnesses on direct examination tending to prove the witness' innocence in a separate and unrelated criminal transaction, is the defense limited to cross-examination on this point, or does the defense have the right to offer independent evidence from another witness tending to disprove the government witness?

2. Is the trial court, in such an instance, given a discretion to refuse to allow the defendant the opportunity to offer such affirmative evidence tending to disprove the testimony of the government witness?

3. Where the trial court is apparently fully aware of what the defense is attempting to prove by a colloquy between court and counsel, and the court rules that he will not permit such a line of questioning, is the error properly preserved?

APPENDIX

Petitioners herein append to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner
419 Atlanta National Building
Atlanta 3, Georgia

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20053

JOHN D. BYRD and RALPH H. BYRD,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(March 6, 1968)

Before TUTTLE, WOODBURY* and BELL, Circuit Judges.

PER CURIAM: The error assigned on this appeal from judgments of conviction on an indictment charging violation of certain of the Internal Revenue statutes having to do with distilled spirits is based on the alleged exclusion of the testimony of a witness for the defense.

In addition to not having been properly preserved and not being plain error, Rule 52, F. R. Crim. P.; the

*Of the First Circuit, sitting by designation.

claimed error does not appear to be error at all since the witness testified in substance to what appellants contend was excluded. Furthermore, the testimony was offered for the purpose of contradicting a statement by a witness for the prosecution, made without objection, going to a collateral matter and there was no abuse of discretion in the ruling of the trial judge.

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
May 9, 1963

Adm. Office, U. S. Courts—Scofields' Quality Prts., Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20053

D. C. Docket No. 22970 Criminal

JOHN D. BYRD and RALPH H. BYRD,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, WOODBURY* and BELL,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be, and the same are hereby, affirmed.

*Of the First Circuit, sitting by designation.

March 6, 1963

Issued as Mandate:

U. S. Court of Appeals
FILED
APR 23 1963
EDWARD W. WADSWORTH,
Clerk

[391] – Bell

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,053

JOHN D. BYRD and RALPH H. BYRD,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From the United States District Court for the Northern District of Georgia

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(April 23, 1963)

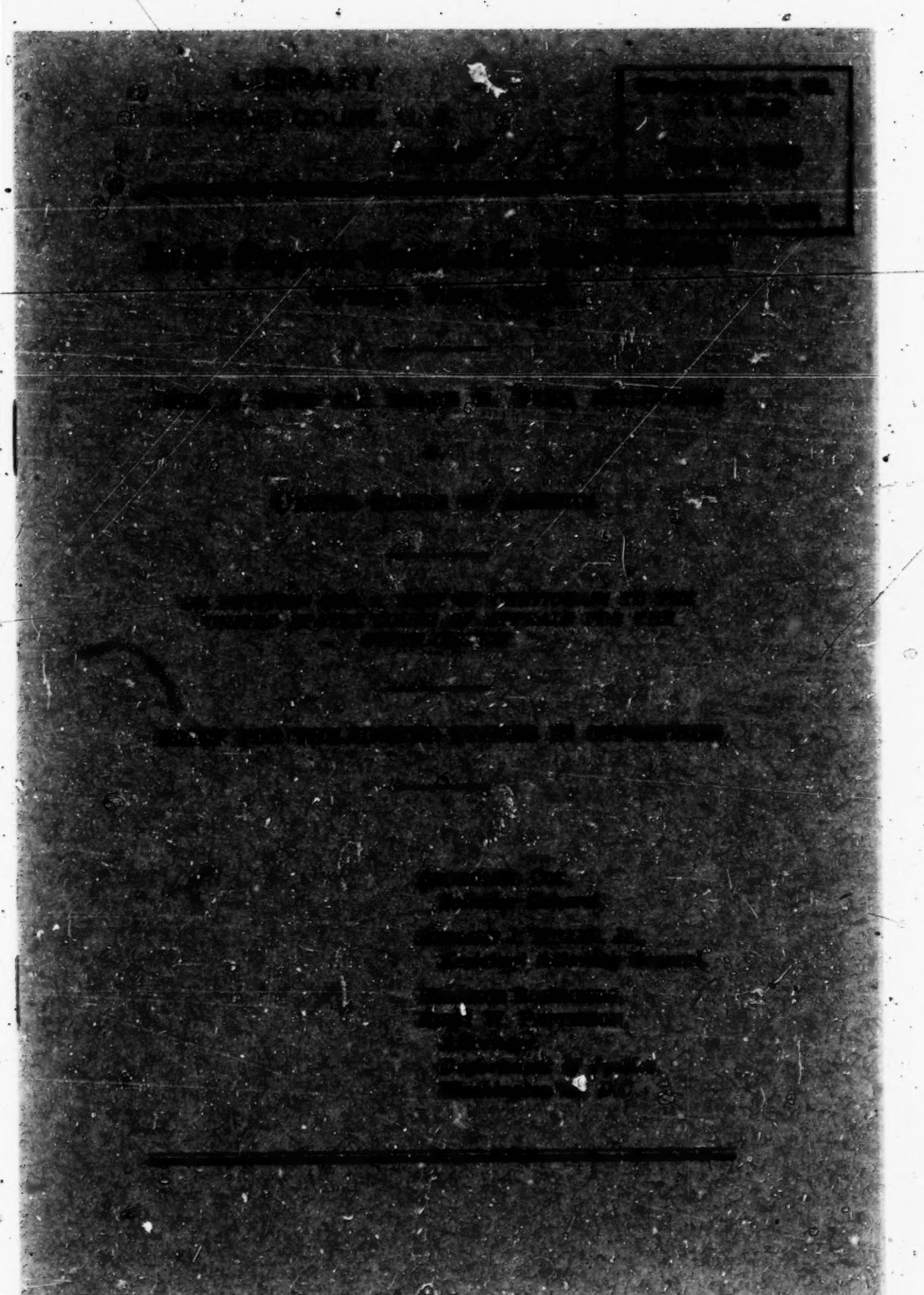
(ON PETITION FOR REHEARING)

Before HUTCHESON, Chief Judge, Woodbury*, Chief Judge and Bell, Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

*Chief Judge, First Circuit, sitting by designation.



In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1123

JOHN D. BYRD and RALPH H. BYRD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 7-8) is reported at 314 F. 2d 336.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1963. A petition for a rehearing was denied on April 23, 1963. The petition for a writ of certiorari was filed on May 23, 1963. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court unduly restricted examination of a defense witness as to a collateral matter.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on two substantive counts and on one count charging conspiracy to violate internal revenue statutes relative to distilled spirits. Each was sentenced to imprisonment for a period of four years (Tr. 1201-1203). The court of appeals affirmed, 314 F. 2d 336. The only question raised by the petition relates to the alleged restriction of the testimony of a defense witness, Alex Evans, as to a matter which had been referred to in the testimony of a government witness, Mrs. Louise Bradford.

Mrs. Bradford testified as to her complicity with petitioners and her deceased former husband, J. D. Beck, in the operation of three illicit stills in the State of Georgia. The first still was started in November 1957 and produced approximately 33,000 gallons of non-taxpaid liquor (Tr. 82, 214). The second was placed in operation in May 1958 and produced around 28,000 gallons (Tr. 96, 215). The third, started in April 1959, after her husband's death, produced about 19,000 gallons (Tr. 107-108, 215). Detailed testimony was given by this witness as to the participation of the two petitioners in acquiring

or leasing the land on which these stills were located, and in their subsequent operation (Tr. 81, 83, 84, 87, 96, 98, 100, 102, 107-108, 109, 113). She also testified as to her own part in these matters. She would take supplies to the stills (Tr. 83) and, when necessary, would advance money to the hired men, for which she was reimbursed by Ralph Byrd (Tr. 95-96, 106-107). She cooked and kept house for the hands and made purchases of groceries and supplies (Tr. 114). During her husband's lifetime, the net proceeds were divided equally between him and the two petitioners (Tr. 173). After his death, she continued the operation contributing to the expenses and agreeing to take one-third of the profits (Tr. 107-108, 115).

At the conclusion of her direct examination, Mrs. Bradford testified that a case was pending against her in Dawson County, which she believed was for manufacturing whiskey. She denied having any connection with this still, which she said belonged to her then husband and other individuals not connected with this case (Tr. 125).

On cross-examination it was brought out that she had been arrested for manufacturing and possessing liquor in November, 1959, by several officers including Mr. Evans, a federal officer, and that she did not appear for trial of the case (Tr. 128-129). She denied having ever seen this still, although, she said, the officers stated that it was behind her house (Tr. 130). She testified that she first called federal officers on Christmas eve in 1959 after a group (not including petitioners) had assaulted her husband, on

his instructions. (Tr. 132, 140-141, 154-159). She admitted signing a statement to the effect that she had paid protection money to Evans (the federal officer who participated in the 1959 arrest) when he was a state officer (Tr. 139).

Alex Evans testified on behalf of petitioners that in November 1959, when he was an investigator for the Treasury Department, he investigated a distillery in Dawson County located approximately 350 yards behind the house in which Mrs. Bradford was living. He said the traffic led right into her house and that there were four stills in operation (Tr. 701-702). When the witness was asked to describe the surroundings of the distillery the court said (Tr. 703):

> Now, he's gone into that. Now, we will not try that distillery case. He's gone into it. He said the workway led right into her yard.

Thereafter Evans said that a search of the garage revealed 84 gallons of non-taxpaid liquor locked up in the shed side of the garage and bales of sugar in a truck parked in the garage. (Tr. 703-704). The court cut off further questioning, again saying that it was not going to try the other case (Tr. 705).

ARGUMENT

The trial court permitted extensive cross examination of Mrs. Bradford on her testimony that the Dawson County distillery belonged to her husband and other persons and that she had no connection with it. Evans was allowed to testify that traffic to

it necessarily passed through her yard and that liquor and sugar were found in the garage. Having permitted Evans to give testimony which impeached Mrs. Bradford, the trial court acted well within its discretion in ruling that further questioning along this line be discontinued, as a full trial of the issues involved in that case was inappropriate to the determination of petitioners' guilt with respect to the three distilleries here involved. Cf. *Arpan* v. *United States*, 260 F. 2d 649 (C.A. 8); *Simon* v. *United States*, 123 F. 2d 80 (C.A. 4), certiorari denied, 314 U.S. 694; *Cwach* v. *United States*, 212 F. 2d 520 (C.A. 8); *United States* v. *Lawinski*, 195 F. 2d 1, 7 (C.A. 7). See, also, 3 Wigmore, *Evidence* (3d ed.), §§ 1000-1007.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General,

HERBERT J. MIELER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JUNE 1963

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